

MEMORANDUM

To: Todd Dumais, Town Planner
Catherine Dorau, Associate Planner

From: Garmon Newsom II, Asst. Corporation Counsel

Date: January 27, 2020

RE: IWWR penalties

The Town Plan and Zoning Commission ("TPZ"), which also serves as the Town of West Hartford's Inland Wetlands and Watercourses Agency ("IWWA"), has asked what remedies exist beyond the "enumerated \$100 fine" with respect to an *Inland Wetlands and Watercourses Regulation* ("IWWR") violation. Additionally, the IWWA has asked for guidance or an interpretation of the meaning of "each calendar day during which said violation shall continue."

The *IWWR* provides for remedies in *IWWR* §§ 14.4 – 14.6. *IWWR* 14.4a authorizes the IWWA to mail a written order to any person violating the *IWWR* or the Inland Wetlands and Watercourses Act, C.G.S. §§ 22a-36 through 22a-45, as amended, "to immediately cease such activity or to correct such facility or condition." *IWWR* 14.4c permits the IWWA to file an action against the violator pursuant to C.G.S. § 22a-44(b). That provision of the General Statutes provides that a violator may be assessed a penalty of not more than **\$1000 for each offense**. The following sentence in C.G.S. § 22a-44(b) states that "[e]ach violation of said sections shall be a separate and distinct offense, and, in the case of a continuing violation, each day's continuance thereof shall be deemed to be a separate and distinct offense." The action must be brought in Superior Court, and that court "shall have jurisdiction to restrain a continuing violation of said sections, to issue orders directing that the violation be corrected or removed and to assess civil penalties pursuant to this section." All court costs, fees and attorneys' fees shall be assessed against the violator.

Other potential remedies are for the IWWA to revoke or suspend a permit, assuming that one was issued (*IWWR* § 14.5), or to impose penalties under Code of the Town of West Hartford ("CWH") Chapter 25, or any other remedies as provided by law (*IWWR* § 14.6). CWH § 25-7.1 permits modest fines of \$100, "in addition to any other penalties which may be authorized by this Code [] or by the Inland Wetlands and Watercourses Regulations of the Town of West Hartford themselves, and each calendar day during which said violation shall continue shall be punishable as a separate offense."

As for the significance of "each calendar day during which said violation shall continue," I have not found an interpretation our specific language in any court decision. However, since that phrase it is another way of identifying a "continuing violation" I also checked for decisions explaining or interpreting the phrase "continuing violation" and found some guidance.

In *Commissioner of Environmental Protection v. Connecticut Building Wrecking Co., Inc.*, 227 Conn. 175, 198 (1993), the defendant attempted to refute a claim of a continuing violation by claiming “that the act of leaving illegally deposited debris in a wetland does not constitute a continuing violation of the prohibition against the depositing of debris.” After reviewing the legislative policy that underlies the wetlands and watercourses statutes, the Court concluded “that the legislature intended a broad definition of ‘continuing violation’ and, accordingly, that that phrase, as used in § 22a-35, may include the illegal depositing of debris in a wetland as well as a subsequent period in which the illegally deposited debris remains in the wetland.” (Emphasis added.)

In *City of Stamford v. Kovac*, 36 Conn. App. 270 (1994), the plaintiff alleged that the defendant “illegally dumped fill and debris in regulated areas without a permit.” The Appellate Court noted that record established that the defendant “‘without legal authority,’ performed grading and filling operations on said wetlands and was instructed by the plaintiff to cease such operations.” *City of Stamford*, 36 Conn. App. at 272 – 273. The Appellate Court affirmed the trial court decision against the defendant, agreeing that there was a continuing violation, and awarded costs, fees and expenses consistent with C.G.S. § 22-44(b). *City of Stamford*, 36 Conn. App. at 280.

What should be taken from this review of the *IWWR* and Chapter 440 of the General Statutes is that the IWWA has a number of remedies available to it. If the IWWA believes that the most appropriate provision to seek relief is under C.G.S. § 22a-44(b), it can do so. Under that provision, the IWWA could initiate an action against the violator if it believes that there has been a violation of C.G.S. §§ 22a-36 – 22a-45, or the *IWWR*. That permits the IWWA to select, depending on the egregiousness of the violation whether to use the *IWWR* or General Statutes.

The courts have found that the factors that the court will consider in determining whether a civil penalty is appropriate include, but are not limited to

- (1) the size of the business involved;
- (2) the effect of the penalty or injunctive relief on its ability to continue operation;
- (3) the gravity of the violation;
- (4) the good faith efforts made by the business to comply with applicable statutory requirements;
- (5) any economic benefit gained by the violations;
- (6) deterrence of future violations; and

(7) the fair and equitable treatment of the regulated community.” *Carothers v. Capozziello*, 215 Conn. 82, 103 – 104 (1990), (violation of environmental legislation regulating solid waste disposal).

In addition, the IWWA could consider initiating an action based on the number of trees cut, if that constitutes an *IWWR* or General Statutes Chapter 440 violation. Depending on which law is applied, the fine could be \$100 or \$1000 for each tree cut. The IWWA would still have the authority, assuming that this incident occurred in a regulated area to impose other penalties, or to require the replacement of the cut trees.